

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EMMETT L. BELK, deceased

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Carrier

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Docket No. 1,024,926

ORDER

Respondent appeals the November 12, 2009, Order of Administrative Law Judge Steven J. Howard (ALJ). Pursuant to K.S.A. 44-516 and/or K.S.A. 44-510 [sic], E. Bruce Toby, M.D., was appointed as a neutral physician to perform an evaluation on claimant's medical records for claimant's left shoulder injury. The doctor was instructed to determine the appropriate functional impairment to the shoulder pursuant to the fourth edition of the *AMA Guides*.¹ The issue of causation was not to be determined as specifically noted in the Order. Claimant is deceased. There is no allegation that claimant's death occurred as a result of his work injury.

Linda K. Belk appeared by her attorney, Michael W. Downing of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Bryce D. Benedict of Topeka, Kansas.

This Appeals Board Member has considered the same record as did the ALJ, consisting of the documents filed of record in this matter.

ISSUE

Did the ALJ exceed his jurisdiction in ordering an independent medical evaluation (IME) of claimant's medical records when claimant is deceased and no substitution of party has been made for a claimant who died of causes unrelated to his work accident?

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Respondent argues that the ALJ is without jurisdiction to proceed in this matter. No brief was filed on behalf of claimant or any representative of claimant or any estate.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order should be reversed.

An Application For Hearing, Form K-WC E-1 (E-1), was filed in this matter by claimant's attorney with the Kansas Division of Workers Compensation (Division) on August 29, 2005, alleging that claimant suffered an injury to his left shoulder, left arm, upper back and all effected areas on June 20, 2005, and every working day since. An Application For Preliminary Hearing, Form K-WC E-3 (E-3), was filed on September 12, 2005. An accompanying letter of certification alleged that treatment was not being properly provided for claimant's injuries. This matter does not appear to have gone to preliminary hearing at that time. On April 24, 2006, a Suggestion Of Death Upon The Record Under K.S.A. 60-225(a)(1) was filed with the Division indicating that claimant had died during the pendency of this action. A Notice Of Pre-Hearing Settlement Conference was filed with the Division on April 25, 2006, providing notice of a preliminary hearing scheduled for May 22, 2006. No transcript of proceedings is contained in this file, but an Order was issued on May 23, 2006, noting that the parties had agreed to a specialist to determine the cause of claimant's death and what, if any, connection existed between claimant's work-related injury and his death. In July 2006, the parties advised the ALJ that an agreement had been reached and claimant's medical records were to be sent to board certified occupational medicine and preventative medicine specialist Allen J. Parmet, M.D., for an independent evaluation.

Dr. Parmet reviewed the large file containing claimant's medical history and filed his August 9, 2006, report with the ALJ on August 24, 2006. The medical records begin on July 29, 1994, and continue after claimant's death on February 12, 2006. The records detail treatment provided on June 22, 2005, after the work-related injury. Claimant was evaluated and treated by numerous physicians through June, July, August and September 2005. An MRI indicated a partial thickness tear of the supraspinatus tendon. Claimant's past medical history was significant in that he suffered from cirrhosis of the liver, emphysema, hepatitis C, asthma and diabetes. Claimant was counseled about a possible liver transplant. However, liver tests indicated it was still early for a transplant.

Dr. Parmet, in his report, noted that claimant was septic due to a Klebsiella pneumonia infection at admission. This infection was noted to be typical of individuals with COPD due to tobacco abuse and concurrent with alcohol abuse. Dr. Parmet noted the question associated with the cause of these infections and a possible relation to claimant's shoulder surgery. He stated that the records from the surgical procedure including anesthesia and operating room notes were not available. These reports would be necessary for him to determine the time the terminal illness began--after the surgery

or as much as a month later. No opinion regarding the cause of these terminal infections was contained in his report of August 9, 2006.

Dr. Toby evaluated claimant on August 8, 2005, and determined that arthroscopic surgery to fix a rotator cuff injury would be appropriate. Claimant underwent left shoulder acromioplasty on January 5, 2006. A followup evaluation on January 18, 2006, discussed appropriate exercises for claimant's left shoulder. Claimant was admitted to the University of Kansas Hospital on February 4, 2006, suffering from ascites, confusion and hypoglycemia. Claimant's history was expanded to include chronic obstructive pulmonary disease (COPD) and a sacral decubitus ulcer. Claimant was immediately evaluated for a possible liver transplant. Laboratory studies indicated worsening liver function and a urinary tract infection. Chest x-rays indicated cardiomegaly, bilateral pleural effusions and bibasilar atelectasis. Claimant's liver function worsened, and he died on February 12, 2006, with the final diagnosis of hepatitis C and alcoholic cirrhosis.

Claimant's attorney filed a Motion To Withdraw As Counsel Of Record Notice Of Lien For Attorney Fees And Expenses with the Division on December 18, 2006. The motion was granted by the ALJ on December 18, 2006. An Entry of Appearance was filed with the Division by claimant's new attorney on January 12, 2007. Attached to the entry was a Case Fee Agreement between claimant's new attorney and Linda L. Belk. No other identification is provided regarding any possible connection between the deceased claimant and Ms. Belk.

The next entry in this file is a notice of a Pre-Hearing Settlement Conference set for November 9, 2009. No transcript is contained in this file from the Pre-Hearing Settlement Conference. The only action from that meeting was the Order issued on November 12, 2009, from the ALJ, which is the reason for this appeal.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 60-225(a)(1) states:

Where claim not extinguished. If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party or by any party and, together with the notice of the hearing, shall be served on the parties as provided in K.S.A. 60-205, and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within a reasonable time after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

The Suggestion Of Death Upon The Record Under K.S.A. 60-225(a)(1) was filed with the Division on April 24, 2006. No motion for substitution was ever filed. There is no indication in this record that an estate has ever been opened for the deceased claimant. The name of Linda L. Belk is noted on the Case Fee Agreement filed with the Division, but what, if any, relationship she has with the deceased is not noted in this record. There has been no indication in this record as to the possible identity of any dependents of the deceased claimant.

K.S.A. 44-510e(b) states:

If an employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment of compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such employee shall cease and be abrogated by the employee's death.

Opening an estate would allow for the appointment of a legal representative and provide a mechanism for determining claimant's heirs at law. This would also assist with determining whether the deceased claimant was survived by any dependents. In this instance, a real party in interest has not been substituted for the deceased claimant. As such, the ALJ was without jurisdiction to enter an Order. Accordingly, the matter shall be reversed and remanded to allow for a substitution of parties, or to determine whether this matter should be dismissed pursuant to K.S.A. 60-225(a)(1).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

As no real party in interest has been identified in this matter, no estate has been opened and no legal representative has been appointed for the deceased claimant, the ALJ was without jurisdiction to enter an Order herein. Therefore, that Order is reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

² K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated November 12, 2009, should be, and is hereby, reversed and the matter remanded for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of February, 2010.

HONORABLE GARY M. KORTE

c: Michael W. Downing, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge